1972

The State of Utah v. Paul Kay Biggs : Brief of Respondent

Utah Supreme Court

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

TATE OF UTAH,
Plaintiff-Respondent,

vs.

UL KAY BIGGS,
Defendant-Appellant.

Case No.

BRIEF OF RESPONDENT

APPEAL FROM FINDING OF
RD DISTRICT COURT IN
E COUNTY, HONORABLE
W, JUDGE.

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STATE OF UTAH,
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PAUL KAY BIGGS,
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Case No. 12971

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant, Paul Kay Biggs, appeals from the finding of guilty of the crimes of burglary in the second degree and grand larceny and the sentence imposed upon him in the Third District Court, Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

The defendant, on May 9th and 10th, 1972, was tried by a jury for second degree burglary and grand larceny. He was found guilty of both crimes and was sentenced by the court to the Utah State Prison.

RELIEF SOUGHT ON APPEAL

The respondent seeks to have the lower court's judg-

> that the defendant was prejudiced by the failure of the prosecuting attorney to make a statement of facts that he expected would appear.... *United States* v. *Sprague*, 8 Utah 378 at 379, 31 P. 1045 (1893).

The court's conclusion is a sound one which has remained intact since the date of its rendition. Besides the inherent variety of each case which require flexibility, the time lag between the commission of a crime and the resulting litigation makes it difficult to plot in advance the course that litigation may take.

The list of cases cited by the defendant beginning with *State* v. *Erwin*, 101 Utah 365, 120 P. 2d 285 (1941), are misapplied in this case. In *Erwin* the prosecutor engaged in a lengthy and vociferous dialogue in his opening statement and the court was faced with the issue of when an opening statement is inappropriate or procedurally impermissible because of its quality, and not if an opening statement is required. As to the issue at hand *Sprague* is controlling and should not be reversed.

There is another way of applying defendant's argument that an opening statement should be required in light of the modern spirit of discovery. When discovery was not so advanced and the element of surprise remained an element to be dealt with in each case, the need for an opening statement to give some direction to the case and allow defense counsel to marshal his evidence to his client's best advantage was crucial. Today counsel has access to more facts prior to trial and should not be surprised by the adversary's case. In light of that improve-

ment in our procedure the ruling as handed down in *Sprague* is solidified and is made even more convincing.

POINT II.

THE TRIAL COURT IS REQUIRED TO GIVE ONLY INSTRUCTIONS SETTING OUT THE ELEMENTS OF THE CRIME ALLEGED AND THE REFUSE TO GIVE DEFENDANT'S REQUESTED INSTRUCTION WAS NOT ERROR.

Appellant's second argument is based on an exception to the court's refusal to give instruction No. 8 which provides:

> "It is the defendant's theory that the burglary in this case was committed by Steve Turpin, Paul Liapis, and others who are now testifying against the defendant because of the immunity that they have been offered by the District Attorney."

In order to determine whether or not the trial court erred in refusing to give that instruction, it is necessary to determine under what circumstances it is proper for the court to refuse to give requested instructions. In 48 Cal. Jur. 2d Trial (1959), the following concepts are outlined:

> "Though the court has no control over and cannot interfere with the right of the jury to pass on the facts and the credibility of the evidence, except to the extent permitted by the constitution, it has supervisory power over their verdict. To this end it is the court's duty and exclusive function to instruct the jury in the law applicable

> to the facts of the case as developed by the evidence, and relevant to the issues presented by the pleadings and the evidence." 48 Cal. Jur. 2d at 190.

The court is duty bound to instruct the jury in the law applicable to the *facts* of the case and when a requested instruction does not set forth any of the appropriate principles of law the court is not bound to give that instruction. *Higgins* v. *Williams*, 45 P. 1041 (1896). In *State* v. *Dubois*, 98 Utah 234, 98 P. 2d 354 (1940), the court recognized this requirement and added another:

> "A party is entitled to have the jury instructed on the *law* governing the issues according to his theory of the case, provided such theory is tenable as a matter of law, or finds possible support in the evidence. But he will not be heard to complain of failure to give instructions if the rules therein set forth are not a correct statement of the law; or if such statement of law is outside the issues to be determined by the jury;" 98 Utah 234 at 245.

In order to be admitted, instruction No. 8 must meet one or both of the requirements set out in *Dubois*. It is clear that the instruction in question is not a statement of law nor could it become such by any possible construction. The second requirement is therefore controlling as to this issue. The immediate problem confronting the jury in this case was the guilt or innocence of the defendants, and not the guilt or innocence of those testifying against the defendant. Defendant's instruction calls for a judgment by the jury which they are unable to make because evidence as to the guilt or innocence of Steve Turpin and

Paul Liapis was not introduced nor should it have been when neither individual was being tried. The instruction is beyond the issues which were before the jury and, therefore, evidence sufficient to support the theory is not found.

Respondent readily recognies the defendant's right to an instruction posing a possible alibi and where the the evidence is sufficient to support the instruction it should be given. *State* v. *Saunders*, 82 Utah 170 at 176, 22 P. 2d 1043 (1933). However, requested Instruction No. 8 does not deal with an alibi, nor does it set forth the law applicable to the facts of this case. In *Wellman* v. *Noble*, 12 Utah 2d 350, 366 P. 2d 701 (1961), the court suggested this standard:

> "When the error assigned is the giving or failure to give instructions, the real inquiry should be were the issues of fact necessary to be determined, and the principles of law applicable thereto, correctly presented to the jury in a clear and understandable manner? That is the purpose of instruction and if it is accomplished, the failure to give additional ones is not of controlling importance." 12 Utah 2d at 352.

In order for the instruction to be admitted to it must be a statement of law relevant to the facts or an issue of fact which necessarily must be determined and which finds support in the evidence. By these standards the trial court should be affirmed in its refusal to include Instruction No. 8 in its instructions to the jury. It seems fundamental that jury instructions are limited to elements of law as they apply to the facts of the case and

as they apply to the particular crime[s] alleged. In *State* v. *Thompson*, 110 Utah 113, 170 P. 2d 153 (1946), the following standard was announced:

> "We have repeatedly criticized the giving of abstract statements of the law to the jury, and held that it is the duty of the court to apply the *law* to the facts supported by the evidence and not instruct on any question which is not involved in the case under the evidence." 110 Utah at 131.

Respondent is convinced that the jury was instructed in accordance with the law of this state and that it was not error for the trial court to refuse defendant's requested Instruction No. 8.

POINT III.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AS TO THE WEIGHT TO BE GIVEN TO THE TESTIMONY OF AN ACCOMPLICE AND THE COURT DID NOT ERR IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION.

The third assignment of error made by the defendant is that the trial court erred in refusing to instruct the jury to carefully scrutinize the testimony of an accomplice offered against the defendant. Respondent initially would contend that the trial court's instructions taken as a whole were sufficient to inform the jury of their responsibility and also were in harmony with the legal standards required. Jury instruction number 6A (R. 26) pertaining to the standard to be applied to the testimony

of an accomplice is nearly identical with the statutory language of Section 77-31-18, Utah Code Annotated which sets out the appropriate standard. The charge to the jury given in Instruction No. 14 (R. 33) sets out the responsibility of the jury to weigh the testimony offered in light of the background and relationship of the witness who offers it and even when taken together with Instruction 6A (R. 26) it should not constitute reversible error.

Respondent is cognizant of the statutory requirement that a conviction must be based on more than the testimony of an accomplice. Utah Code Ann. § 77-31-18 (1953). Accordingly, we submit that the test set out in *State* v. *Cox*, 74 Utah 149, 277 P. 972 (1929), as to the sufficiency of corroborative evidence was met in this case.

> ". . . that the test of sufficiency of corroborative evidence is that it need not be sufficient in itself to support a conviction, but it must implicate the accused in the offense, and not be consistent with his innocence, and must do more than cast a grave suspicion on the accused." 74 Utah at 152.

By turning to the record of the proceeding in the trial court, several pieces of evidence serve to corroborate the testimony of the accomplice who himself testified that the defendant actually participated in the burglary. Testimony was offered to show the defendant had requested information as to any items of value that might be found in the house that was burglarized (R. 86-87).

Testimony was given by a man who received the stolen television from the defendant and sold it to an-

other man who have a check for the television (R. 101-103). The same check had the defendant's endorsement on it and was cashed by the defendant. This check was introduced as state exhibit number 3-P (R.99). When the testimony and evidence which was brought forth by the state is taken together with all other evidence provided the jury is not required to convict the defendant on the testimony of an accomplice alone. Rather as is required by *Cox*, it does implicate the accused and is in no way consistent with his innocence and does more than cast a grave suspicion on the accused. Respondent submits that the corroborative evidence offered against the defendant is sufficient to sustain the testimony of the accomplice, and taken together there was evidence to support the jury's initial decision. We therefore urge the court to reject defendant's assignment of error and allow the decision rendered by the trial court to stand.

CONCLUSION

It is respectfully submitted that:

1. The law of this jurisdiction requires no opening statement from the prosecutor and that the trial court did not err when it required no such statement from the prosecution.

2. The requested instruction by defendant failed to state the appropriate law and was not supported by the evidence of the case and was therefore appropriately refused by the trial court.

3. The instruction given by the trial court as to the

need for corroborating evidence to support the testimony of an accomplice was correctly given and no error was committed by the court in refusing to give additional instructions concerning that subject.

Respectfully submitted,

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